

file

**BEFORE THE  
STATE OF WISCONSIN  
Division Of Hearings And Appeals**

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Application of the Village of Menomonee Falls for  
Grading in Excess of 10,000 Square Feet on the  
Banks of Lilly Creek, Village of Menomonee Falls,  
Waukesha County, Wisconsin

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Case No. 3-SE-95-550

**RULING AND ORDER FOR DISMISSAL**

The Village of Menomonee Falls (the Village) filed a Motion to Dismiss the Request for Hearing on April 11, 1997. All parties had the opportunity to submit written briefs to the Division.

The parties do not dispute the basic facts for purposes of this jurisdictional motion. The Village intends to construct an extension of a road located in the Village. The road is called Dolphin Drive and is a public road maintained by the Village and open to public vehicular traffic.

The Village argues that the Department of Natural Resources (the Department or the DNR) lacks jurisdiction to require a grading permit in the instant matter because subsec. 30.19(1m)(a), Stats., explicitly states that the statute does not apply to the "...construction and repair of public highways...."

The DNR now agrees that it does not have jurisdiction to require a grading permit in this matter. The Department originally asserted jurisdiction in this matter based upon the Southeast Region's policy of asserting jurisdiction over grading associated with road projects which do not fall under the exemption contained in sec. 30.12(4), Stats. The Department's legal counsel states in his brief that the Region's position "...is not consistent with the Department's statewide administration of sec. 30.19, Stats." (DNR letter brief, p. 1) The Department urges that the matter be dismissed for lack of jurisdiction. (Id, p. 2)

The objectors assert that there will be significant environmental consequences, including the destruction of wetlands, from the proposed project. However, this issue is germane only if the threshold jurisdictional authority exists to regulate the grading.

On this issue, the objectors argue that the term "public" in sec. 30.19(1m)(a), Stats., should be read as "state". Accordingly, under this interpretation, the statute would be rewritten to exempt only the "construction and repair of state highways". Such a policy might make sense; however, for purposes of this administrative proceeding, the

statute must be interpreted as it is written. Dolphin Drive is clearly a "public highway" as that term is defined in sec. 194.01(12), Stats., relating to motor vehicle transportation:

Public Highway

Every public street, alley, road, highway or thoroughfare of any kind, except waterways, in this state while open to public travel and use."

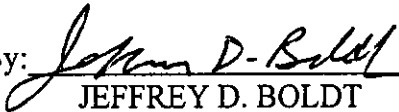
It is also a public highway as those terms are commonly understood. Because Dolphin Drive is a "public highway", the Department lacks jurisdiction to require a grading permit pursuant to the explicit exemption of public highway projects in sec. 30.19(lm)(a), Stats.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the above-captioned matter be DISMISSED, for lack of jurisdiction.

Dated at Madison, Wisconsin on June 5, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By:   
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.